92-205

No.

Supreme Court, U.S.
FILED
JUL 31 1992
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# In the Supreme Court of the United States

OCTOBER TERM, 1992

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FREDERICK A. GROSS, PETITIONER

*v.*

UNITED STATES OF AMERICA, RESPONDENT

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**Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

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## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether petitioner was entitled to have the jury specifically instructed with respect to his good faith defense.

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## PETITION FOR A WRIT OF CERTIORARI

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Frederick A. Gross respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

### OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-28a) is reported at 961 F.2d 1097. The opinion of the district court (App., *infra*, 29a-44a) is unreported.

### JURISDICTION

The court of appeals entered its judgment on April 20, 1992 (App., *infra*, 1a-28a), and denied Gross's petition for rehearing on May 19, 1992 (App., *infra*, 45a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATEMENT

Petitioner, Frederick A. Gross, was charged with conspiracy to violate the securities laws (in violation of 18 U.S.C. § 371; 15 U.S.C. §§ 78j(b), 78m(a) and 78ff(a); 17 C.F.R. §§ 240.10b-5 and 240.13a-13) and two counts of making false statements (in violation of 15 U.S.C. §§ 78m(a) and 78ff(a); 17 C.F.R. § 240.13a-13) in connection with a scheme to deceive and defraud the investing public and shareholders of Systems and Computer Technology Corporation ("SCT"), a computer services company of which petitioner was a co-founder, President and Chief Executive Officer. App., *infra*, 3a. The government alleged that petitioner and his co-defendant, William M. Searcy, a Vice President and Director of SCT, conspired to inflate artificially the income recognition of SCT in order to make the company's publicly-traded stock more attractive to potential and current shareholders. *Id.* at 3a-4a. Petitioner was convicted of these charges; Searcy was acquitted. *Id.* at 3a.

In addition, Searcy alone was charged with two counts of insider trading (in violation of 15 U.S.C. §§ 78j(b) and 78ff; 17 C.F.R. § 240.10b-5) and two counts of mail fraud (in violation of 18 U.S.C. § 1341). App., *infra*, 3a. Searcy was convicted of these charges. *Ibid.*

The government's evidence at trial showed that SCT issued "out letters" to entities who had signed or might sign a contract for the provision of services by SCT, thus giving the clients the option to escape from what would otherwise be legally binding contracts. App., *infra*, 4a. The government also adduced evidence that the "out letters" were concealed from SCT's outside auditors and from the attorney who

rendered the legal opinion that SCT's contracts created legally enforceable obligations. *Id.* at 4a, 21a. The company's revenue reports, which were prepared by individuals who relied on the contracts alone and lacked knowledge of the "out letters," treated the contracts as if they were binding commitments, thereby overstating the revenues recognized in SCT's revenue reports. *Id.* at 4a. The evidence further showed that the overstatements of SCT's revenues were included in quarterly reports filed with the Securities and Exchange Commission. *Ibid.*

Petitioner testified at trial that he believed that SCT was properly recognizing revenue on the basis of meaningful commitments and that the quarterly reports filed with the SEC contained no false or misleading statements. C.A. App. 1589a, 1595a-1598a, 1624a, 1666a, 1755a-1756a. He acknowledged awareness of "out letters" but claimed that in his mind these letters did not materially affect the binding nature of the agreements between SCT and its clients and were merely an articulation of SCT's long-standing, well-known policy of never enforcing its contracts by legal action. *Id.* at 1555a-1557a, 1596a, 1628a, 1636a. Petitioner testified that he had always referred to the "out letters" as "comfort letters" because they were designed simply to put the client at ease by a promise of release from the commitment if necessary. *Id.* at 1562a-1563a, 1603a-1605a. He further testified that he never viewed the letters as undercutting the commitment itself, particularly in light of the fact that these clients had never before asked to be released from their commitments. *Id.* at 1558a-1564a, 1587a-1589a, 1595a-1598a, 1603a-1605a, 1620a-1622a, 1666a, 1755a-1758a. Significantly, dur-

ing the time period that the alleged scheme to overstate revenue was said to have operated, inflating the value of SCT stock, petitioner did not sell a single share of his considerable stockholdings in SCT (*id.* at 1664a); when the stock lost nearly 40 percent of its value upon the public disclosure of adverse facts concerning SCT's revenue recognition practices, petitioner suffered the greatest individual loss of any SCT shareholder (*id.* at 1663a-1664a).

Petitioner denied the allegations by prosecution witnesses that he himself had taken part in deceiving the company's accountants and counsel. C.A. App. 1564a-1568a, 1609a-1617a, 1641a-1646a, 1649a-1653a, 1791a. While he admitted pressuring SCT employees to increase sales revenue, he denied any awareness of efforts on their part to inflate revenue artificially. *Id.* at 1553a-1554a, 1613a-1617a, 1622a-1624a, 1643a-1644a, 1665a-1667a. Petitioner further maintained that he believed that there was nothing hidden or secret about the "out letters," and he expressed disbelief that the accountants were unaware of them. *Id.* at 1566a-1568a, 1629a-1630a, 1646a-1648a, 1755a-1756a. In sum, petitioner claimed to have acted in good faith and to have honestly believed in the truth of the representations made in the SEC filings, no matter how wrong they might later have turned out to be.[1]

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[1] Important aspects of petitioner's testimony were corroborated by other defense witnesses as well as by testimony elicited during cross-examination of prosecution witnesses. For example, prosecution witnesses confirmed that SCT's "no sue" policy was known throughout the company and also by its outside accountants and counsel. C.A. App. 316a. There was also testimony that SCT's accountants had been aware of "outs" and conditions in earlier contracts (*id.* at 1263a-1266a, 1269a-1270a), and that the accountants had agreed

As the court of appeals below noted (App., *infra*, 4a-5a, 9a), petitioner acknowledged at trial that he had taken many of the actions that the government alleged, and his only real defense to the government's charges was good faith. The court of appeals further noted that "[c]onsistent with this theory," petitioner properly requested a jury charge that stated that his good faith would be a defense to the offenses for which he was charged. *Id.* at 5a.

While the district court *did* instruct on the good faith defense, it did so "solely" as to co-defendant Searcy, and only on the offenses as to which Searcy alone was charged. C.A. App. 2160a.[2] The court explicitly limited the good faith defense to Searcy

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that a binding commitment did not have to be without conditions (*id.* at 1336a-1337a, 1644a-1646a). In addition, both prosecution and defense witnesses testified that whether there was a contract in a given situation was often a complex decision, difficult of determination, and that an "unconditional" or "non-cancelable" contract was either non-existent or rare. *Id.* at 1496a-1505a. Finally, prosecution witnesses acknowledged that there were occasions when petitioner had refused revenue recognition recommended by company personnel and even advised his accountants to reverse earlier revenue recognition when he thought that appropriate. *Id.* at 317a-319a, 1330a, 1387a-1388a, 1448a.

[2] The jury was charged as to the counts applicable to Searcy alone (C.A. App. 2165a):

> Since an essential element of the crime charged is intent to defraud, it follows that good faith on the part of a defendant is a complete defense to a charge of securities fraud.
>
> A defendant, however, has no burden to establish a defense of good faith. The burden is on the Government to prove fraudulent intent and consequent lack of good faith beyond a reasonable doubt.
>
> Even false representations or statements or omissions of material facts do not amount to a fraud unless done

(App., *infra*, 5a), instructing the jury that the word "defendant" in the good faith instruction meant "only Mr. Searcy" (C.A. App. 2160a, 2168a) and emphasizing throughout the charge that the jury must take the law from the court and consider each defendant separately (*id.* at 2121a, 2125a, 2140a).

In connection with his post-trial motions, petitioner renewed his contention that the district court erred in refusing to instruct the jury specifically on his good faith theory of defense, and argued that this error was compounded by giving the theory of defense instruction as to Searcy but not as to him, thereby suggesting to the jury by "negative implication" that petitioner was not entitled to rely on a good faith defense. App., *infra*, 8a-9a. In its written memorandum denying petitioner's motion for new trial, the district court held that it had not committed reversible error in refusing to instruct on good faith because the instructions on the "essential elements the government must prove" were adequate to "place[] Gross's 'good faith' defense directly before the jury." *Id.* at 39a, 42a. In so holding, the district court relied on the conclusion reached by what it described as "[t]he majority of federal appellate courts which have considered this issue"—that "a 'good faith' charge is not required when the jury is properly instructed on the requisite level of intent the government must prove in order to secure a conviction." *Id.* at 41a. The district court's opin-

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with fraudulent intent. However misleading or deceptive a plan may be, it is not fraudulent if it was devised or carried out in good faith. An honest belief in the truth of the representations made by a defendant is a good defense, however inaccurate the statements may turn out to be.

ion made no reference to petitioner's "negative implication" claim of error.

On appeal to the Third Circuit, petitioner again contended that the district court's failure to give a specific instruction on his good faith theory of defense was reversible error—particularly since the court *did* give a good faith instruction but explicitly limited the defense to Searcy. Petitioner argued that this amounted to a "misdirection" by the court that "gutted" his defense because it strongly suggested to the jury, by "negative inference," that petitioner was *not* entitled to the good faith defense. Br. for Appellant, at 29, 36.

The court of appeals described the question presented—"whether the failure to instruct specifically on good faith as a defense was an abuse of discretion"—as a question of "first impression" in the Third Circuit. App., *infra*, 9a, 11a. The court acknowledged, as the government had conceded, that petitioner would not be guilty if he had acted under a good faith belief that he was not violating the law. *Id.* at 9a. The court also explicitly recognized that this issue had divided the courts of appeals (*id.* at 11a-12a), with the Eighth and Tenth Circuits ruling that the failure to give a specific good faith instruction requires reversal, and the First, Second, Fifth, Ninth and D.C. Circuits holding such failure not to amount to reversible error. Expressing the view that "a jury finding of good faith is inconsistent with a finding that the defendant acted knowingly and willfully" (*id.* at 12a), the Third Circuit joined those courts that hold that it is not an abuse of discretion to fail to instruct on the good faith defense. In its view, a specific instruction on good faith is "redundant" and unnecessary if the charge "already con-

tains a specific statement of the government's burden to prove the[] elements of the crime." *Id.* at 12a.

As to the additional point of error raised by petitioner—that by giving a good faith defense instruction explicitly limited to Searcy and the offenses charged against him alone, the court may have misled the jury to believe that the good faith defense was available to Searcy only and not to petitioner—the court of appeals reasoned that "no negative implication could have arisen when neither defendant received the good faith instruction on the crimes with which both defendants were charged." App., *infra*, 13a. The court thus concluded that "the jury was not misled." *Ibid.*

## REASONS FOR GRANTING THE PETITION

The circuits are in clear and irreconcilable conflict over the important and recurring question presented in this case—whether a defendant in a criminal case who makes out an adequately supported defense of good faith is entitled to have the jury specifically instructed on his good faith defense, or whether instruction on the elements of the offense is sufficient. In this case, the Third Circuit expressly rejected (App., *infra*, 11a-12a) the view held by the Eighth and Tenth Circuits that instruction on the elements of the offense is an inadequate surrogate for an instruction from the court specifically directing the jury's attention to the fact that good faith is a defense to the offense charged. Rather, the Third Circuit reasoned that the good faith defense is "simply a reiteration that the government must carry its burden * * * to prove the[] elements of the crime," and thus a specific instruction on the defense "is merely surplusage." *Id.* at 11a, 12a. Accordingly, it

adopted the position taken by the First, Second, Fifth, Ninth and D.C. Circuits—that instruction on the elements of the offense is sufficient to present the defense of good faith to the jury—and held that there was no error in failing to give a specific instruction on the good faith defense. *Ibid.*

This sharp division among the circuits on a recurring, fundamental question of criminal procedure has been widely recognized and explicitly noted in many decisions of the courts of appeals. The clear split in the circuits also has been acknowledged by the Solicitor General in opposing the grant of certiorari in a case in which the petition did not actually present the question over which the circuits are divided. See *Green* v. *United States*, 474 U.S. 925 (1985), U.S. Br. in Opp. at 16 n.11 (No. 84-2032).[3]

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[3] The petitioner in *Green* did not argue that it was error to fail to give a specific instruction on the good faith defense. To the contrary, it was the petitioner's position that his rights would be safeguarded by *either* a separate good faith defense instruction *or* an instruction on specific intent to defraud; the claimed error was the failure to give *any* instruction on *mens rea* or willfulness. Pet. 12, 474 U.S. 925 (No. 84-2032).

Besides the *Green* case, we are aware of three other cases involving unsuccessful petitions to this Court raising challenges to the failure to instruct adequately on the good faith defense. See *United States* v. *Cusino*, 694 F.2d 185 (9th Cir. 1982), cert. denied, 461 U.S. 932 (1983); *United States* v. *McGuire*, 744 F.2d 1197 (6th Cir. 1984), cert. denied, 471 U.S. 1004 (1985); *United States* v. *Nivica*, 887 F.2d 1110 (1st Cir. 1989), cert. denied *sub nom. Wellington* v. *United States*, 494 U.S. 1005 (1990). In each of those cases, however, it was evident that the question on which the circuits are split either was not adequately preserved for review or was not squarely presented in the petition; the denials of certiorari thus do not reflect a conclusion that the question presented in the instant

Significantly, notwithstanding the deficiency in the *Green* petition that appeared to make it wholly inappropriate as a vehicle for resolving the conflict, two members of the Court voted to grant certiorari to resolve the "square conflict among the Courts of Appeals" on the question whether a defendant is "entitled to a separate jury instruction on [the good faith defense] when the court gives a sufficient instruction on specific intent." 474 U.S. 925 (White, J., joined by Brennan, J., dissenting).

This case, by contrast, squarely presents the circuit split issue. If petitioner had been tried in the Eighth or Tenth Circuits, he would either have received the requested good faith instruction or had his convictions reversed on appeal. This case therefore provides an ideal opportunity to resolve finally this important question of criminal procedure and to bring certainty and uniformity to this area of federal criminal law.

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petition does not merit Supreme Court review. Specifically, the petitioner in *Cusino* had not requested a good faith instruction at trial, and thus the issue was not properly raised or preserved for appellate review. See U.S. Br. in Opp. at 6-7, 461 U.S. 932 (No. 82-6128). And in both *McGuire* and *Wellington*, the trial court's charge to the jury *did* include some specific reference to the good faith defense theory, so that the petitioners' argument was reduced to the weaker complaint that the theory of defense instruction given was not "complete." *McGuire*, Pet. 6-7, 471 U.S. 1004 (No. 84-809); *Wellington*, Pet. 17, 494 U.S. 1005 (No. 89-6360). The failure of the Sixth and First Circuits to find reversible error in those circumstances therefore presented no conflict with any other courts, because no circuit requires a particularly worded good faith instruction.

## I. THE COURT OF APPEALS' DECISION IS IN IRRECONCILABLE CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS

The Third Circuit expressly acknowledged (App., *infra*, 12a) that its decision is in square conflict with the decisions of the Eighth and Tenth Circuits in *United States* v. *Casperson*, 773 F.2d 216, 223-224 (8th Cir. 1985), and *United States* v. *Hopkins*, 744 F.2d 716, 718 (10th Cir. 1984) (en banc). Those cases hold that it is reversible error to fail to give a properly requested specific instruction on the good faith defense. In rejecting the approach followed by the Eighth and Tenth Circuits, the Third Circuit explicitly adopted the "contrary" position followed by a number of other courts of appeals. App., *infra*, 12a. The Third Circuit thus is now in agreement with the First, Second, Fifth[4], Ninth and D.C. Circuits in

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[4] The Fifth Circuit has made a complete about-face on this issue. It initially followed the position taken by the Eighth and Tenth Circuits, holding that an instruction on the intent element of the offense does not adequately convey a defendant's good faith defense to the jury and that a separate good faith instruction is necessary to avoid reversible error. See, *e.g.*, *United States* v. *Lewis*, 592 F.2d 1282, 1286-1287 (5th Cir. 1979) (intent to defraud instruction did not "precisely and specifically" bring defendant's good faith defense to jury's attention; refusal to give separate good faith instruction was reversible error); *United States* v. *Goss*, 650 F.2d 1336, 1345 (5th Cir. 1981) ("[c]harging the jury that a finding of specific intent to defraud is required for conviction * * * does not direct the jury's attention to the defense of good faith with sufficient specificity to avoid reversible error"). The Fifth Circuit adhered to that position in several subsequent cases. See, *e.g.*, *United States* v. *Curry*, 681 F.2d 406, 416-417 (5th Cir. 1982); *United States* v. *Fowler*, 735 F.2d 823, 828-829 (5th Cir. 1984). The Fifth Circuit then sharply departed from its "*per se* rule" approach in *United States* v. *Fooladi*, 746 F.2d 1027, 1030 (5th Cir. 1984), cert. denied, 470 U.S. 1006 (1985), holding that the failure to give a good faith

holding that instruction on the elements of the offense is sufficient and that it is not reversible error to fail to give a specific instruction on the good faith defense even if good faith is in fact an available defense.[5]

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defense instruction is reversible error only when the charge, viewed in the context of the entire trial and argument of counsel, "thwarted" defendant's presentation of his good faith defense. See also, *e.g.*, *United States* v. *Gunter*, 876 F.2d 1113, 1119-1120 (5th Cir. 1989) (failure to give requested instruction on good faith defense "did not thwart appellants' presentation of their defense and does not constitute reversible error"); *United States* v. *Lavergne*, 805 F.2d 517, 523 (5th Cir. 1986) ("abuse of discretion occurs only when the failure to give a requested instruction serves to prevent the jury from considering the defendant's defense").

[5] See, *e.g.*, *United States* v. *Dockray*, 943 F.2d 152, 154-155 (1st Cir. 1991) (the element of intent to defraud is "essentially the opposite of good faith"); *United States* v. *McElroy*, 910 F.2d 1016, 1026 (2d Cir. 1990) (instruction on intent "conveyed the essence of a 'good faith defense' instruction"); *United States* v. *Rochester*, 898 F.2d 971, 979 (5th Cir. 1990) (instruction on willfulness and specific intent adequate because " 'a finding of specific intent to deceive categorically excludes a finding of good faith' "; quoting *United States* v. *Lavergne*, 805 F.2d 517 (5th Cir. 1986)); *United States* v. *Alcantar*, 832 F.2d 1175, 1179 (9th Cir. 1987) ("defendant is not entitled to a separate good faith instruction when the court gives an adequate instruction on specific intent"); *United States* v. *Green*, 745 F.2d 1205, 1209 (9th Cir. 1984), cert. denied, 474 U.S. 925 (1985) (same); *United States* v. *Gambler*, 662 F.2d 834, 837 (D.C. Cir. 1981) (instructions on government's burden to prove element of specific intent "sufficiently covered the particular point raised by appellant's requested 'good faith' instruction"). See also, *e.g.*, *United States* v. *Bonanno*, 852 F.2d 434, 439-440 (9th Cir. 1988) (noting that although defendant did not request a good faith instruction, "instruction on specific intent precluded the need for an instruction on good faith"), cert. denied, 488 U.S. 1016 (1989).

In stark contrast, the Tenth Circuit has long held that "[t]he 'good faith' instruction is required to be given as a separate subject" and that "instructions on wilfulness, on aspects of intent, on untruth of representations or fraudulent statements are *not* sufficient for this purpose." *United States* v. *Hopkins*, 744 F.2d 716, 718 (10th Cir. 1984) (en banc) (emphasis in original); accord *Steiger* v. *United States*, 373 F.2d 133, 136 (10th Cir. 1967) (failure to give good faith instruction was reversible error because instructions on willfulness, unlawful intent, and specific intent failed to "fairly, clearly and fully submit[] the defense of good faith" to the jury). This position is firmly entrenched in the jurisprudence of the Tenth Circuit.[6]

The Eighth Circuit has reached the same result. In *United States* v. *Casperson*, 773 F.2d 216, 223 (8th Cir. 1985), it held that "[defendants] were entitled * * * to have the jury specifically instructed on their good faith theory of defense" because a specific in-

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[6] See, *e.g.*, *United States* v. *Haddock*, 956 F.2d 1534, 1547 (10th Cir. 1992) (finding reversible error for failure to give good faith instruction, holding that "general instructions on willfulness and intent are insufficient to fully and clearly convey a defendant's good faith defense to the jury"), on rehearing, 961 F.2d 933 (1992), petition for cert. filed, 60 U.S.L.W. 3881 (June 15, 1992) (No. 91-2016) (on other ground); *United States* v. *Mann*, 884 F.2d 532, 536-537 (10th Cir. 1989) ("general instruction on willfulness * * * is not adequate * * * to present the defense of good faith"); *United States* v. *Harting*, 879 F.2d 765, 767 (10th Cir. 1989) ("trial court must instruct separately on the defense of good faith"); *United States* v. *Harrold*, 796 F.2d 1275, 1283 (10th Cir. 1986) (good faith instruction must be given as "'a separate subject'"; "instructions simply defining willfulness are in this circumstance insufficient"), cert. denied, 479 U.S. 1037 (1987).

struction on good faith is necessary to "direct[] the jury's attention to the defense of good faith with sufficient specificity to avoid error." Accord, *United States* v. *Conners*, 894 F.2d 987, 990-991 (8th Cir. 1990) (finding no reversible error only because defendant's objection was to the words used in the trial court's instruction, and not, as in *Casperson*, to the court's failure to give a good faith or theory of defense instruction at all).

Although it does not appear that the Fourth, Sixth and Seventh Circuits have addressed the precise question presented here, decisions of these courts strongly suggest that they are in accord with the proposition that a defendant is entitled to have an instruction specifically informing the jury of his theory of defense. For example, in the context of a requested instruction on good faith reliance on advice of an expert tax preparer, the Fourth Circuit held that the failure to give a specific instruction on the reliance defense was reversible error, even though the court's instructions directed acquittal if the defendant acted "in good faith." *United States* v. *Mitchell*, 495 F.2d 285, 288 (4th Cir. 1974). In so holding, the Fourth Circuit reasoned that the trial court's "oblique references to defendant's defense" denied the defendant "the precise and specific charge to which he was entitled." *Ibid.*

Similarly, in a case involving a requested instruction on good faith reliance on advice of an accountant, the Sixth Circuit held that the trial court's failure to give a good faith instruction was reversible error; according to the court, without such an instruction the defendant's theory was not presented "adequately in a full statement of the law." *United States* v.

*Duncan*, 850 F.2d 1104, 1117-1118 (6th Cir. 1988). Consistent with the view held by the Eighth and Tenth Circuits, the Sixth Circuit flatly rejected the argument that a "boilerplate instruction on willfulness" is a sufficient substitute for a specific instruction on the good faith defense. *Ibid.*[7] Rather, the court emphasized that a "defendant is entitled to an instruction that tells the jury about a central theory of his defense." *Id.* at 1119.

Finally, in a case involving a requested instruction on the advice of counsel defense, the Seventh Circuit declined to accept the government's argument that instruction on the elements of the offense, together with argument of counsel, are sufficient to present the defense to the jury. See *United States* v. *Walters*, 913 F.2d 388, 392 (7th Cir. 1990). Rather, emphasizing the importance of explicit instructions from the court to guide the jury, for which argument of counsel is no substitute, the Seventh Circuit held that the district court's failure to specifically instruct the jury on the defendant's theory of defense was reversible error. *Ibid.*

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[7] Although the Sixth Circuit's decision in *United States* v. *McGuire*, 744 F.2d 1197 (6th Cir. 1984), cert. denied, 471 U.S. 1004 (1985), has been cited by the court below and others as supporting the government's position in this case (see, *e.g.*, App., *infra*, 11a; *Haddock*, 956 F.2d at 1547 n.11; *McElroy*, 910 F.2d at 1026; *Nivica*, 887 F.2d at 1125)), clearly it does not. As previously discussed (at n.3, *supra*), the instructions given in *McGuire* actually did refer to the defendants' defense that "they believed that they had a right to act as they did, and that they acted in the belief that they were within their legal rights in view of all of the circumstances as they viewed them." 744 F.2d at 1201 n.2.

In sum, it is undeniable that the courts are hopelessly divided on the instruction issue. It is impossible to reconcile the position of the First, Second, Third, Fifth, Ninth and D.C. Circuits, finding no reversible error in failing to give a specific instruction on the good faith defense where the jury is instructed on the elements of the offense, with the completely opposite view held by the Eighth and Tenth Circuits and, apparently, the Fourth, Sixth and Seventh Circuits, that instruction on the elements is *not* an adequate surrogate for an instruction from the court specifically directing the jury's attention to the defendant's defense.

The courts have been divided on this issue for more than a decade, and the division has only deepened with time. The split among the circuits could now be viewed as one of rough equipoise, with only the Eleventh Circuit yet to address the question on its own.[8] There is no realistic prospect for resolution of this conflict without a decision by this Court.

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[8] At this time, the position of the Eleventh Circuit cannot be reliably determined. Under *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions handed down prior to October 1, 1981, which would include the Fifth Circuit's *Goss/Lewis* line of cases (discussed at note 4, *supra*). The Eleventh Circuit in fact made reference to this authority in *United States* v. *Williams*, 728 F.2d 1402, 1404-1405 (11th Cir. 1984), citing *Goss* and *Lewis* for the proposition that "an instruction on good faith should be given" as long as it is supported by the evidence; on the facts of *Williams*, however, the court found no reversible error in the trial court's failure to give a requested good faith instruction because there was no evidence in the record to support the defense. *Ibid.*

## II. THE QUESTION PRESENTED IS IMPORTANT

The question of a defendant's right to a specific instruction from the court presenting to the jury his theory of defense is of critical importance in the trial of criminal cases. Moreover, this question is not conceptually confined to the good faith defense. That is, a decision by this Court would not only clarify whether and in what circumstances instruction on the elements of an offense may be an adequate proxy for a specific instruction on the good faith defense, but it would inform decisions of the courts as to the specificity required for instruction on other defense theories that involve a defense concept that is similarly closely interwoven with the element of "willfulness."

Review by this Court is also necessary to bring uniformity to this important area of federal criminal law and to correct the unfairness caused by the contrary approaches taken by the courts on this issue. As Justices White and Thomas recently have observed, "the outcome of a federal criminal prosecution should not depend upon the circuit in which the case is tried." *Tomala* v. *United States*, 112 S. Ct. 1997, 1998 (1992) (White, J., joined by Thomas, J., dissenting from denial of certiorari). But that is precisely the result that obtained here. If petitioner had been tried in the Eighth or Tenth Circuits, or even the Fourth, Sixth or Seventh, either he would have received a specific instruction on his good faith defense or his convictions would have been reversed on appeal. By the mere fortuity of having been tried in the Third Circuit, petitioner was deprived of such an instruction and his convictions were sustained despite this deprivation.

The disparate treatment of defendants raising this issue in federal criminal cases is a recurring problem, as demonstrated by the steady stream of appeals challenging the adequacy of instructions on a defendant's good faith theory of defense. See cases cited at pp. 11-14 and nn.4-6, *supra*. This confirms the importance of review by this Court to resolve the conflict.

### III. THE DECISION OF THE COURT OF APPEALS IS ERRONEOUS

If the courts are obliged to give *meaning* rather than merely pay lip service to the venerable principles that "a defendant is entitled to an instruction as to any recognized defense" for which there exists some evidence in the record (*Mathews* v. *United States*, 485 U.S. 58, 63 (1988)) and "has a right to a full statement of the law from the court" (*Bird* v. *United States*, 180 U.S. 356, 361 (1901)), for which "arguments of counsel * * * [are no] substitute" (*Taylor* v. *Kentucky*, 436 U.S. 478, 488-489 (1978)), then the decision below is incorrect. These authorities recognize that which the court of appeals below, as well as the other courts reaching the same result, have ignored—the unique importance of instructions from the court to focus the jury's attention on the essential issues in the case and to inform the jury of the permissible ways in which the issues may be resolved. *Ibid.*

Indeed, the position adopted by the Third Circuit—that instruction on the elements of an offense is sufficient because a finding of intent and willfulness is the obverse of good faith, rendering a specific instruction on the good faith defense "merely surplusage"—all but nullifies these principles. First, this approach deprives the defendant of the right to have his good

faith theory presented to the jury in the form of instructions *from the court* in a manner that validates the theory as an available defense. As the source of the law and the only neutral figure before the jury, the judge's words are potent. That reality drives the idea that a defensive theory is best expressed by the judge.

Moreover, this approach disregards completely the essential purpose of the jury charge "to explain the law of the case, to point out the essentials to be proved on the one side and the other, and to bring into view the relations of the particular evidence adduced to the particular issues involved." *Bird* v. *United States*, 180 U.S. at 361. Thus, while instruction on the elements of a crime suffices "to point out the essentials to be proved" by the prosecution, it provides no guidance whatever as to the "relations of the particular evidence adduced to the particular issues involved" with respect to the defendant's asserted good faith. The chief objective of a good faith instruction is to guide the jury in evaluating the evidence presented at trial bearing on the defendant's state of mind and to make clear that certain beliefs of the defendant, if genuinely held, could effectuate a valid good faith defense. See, *e.g.*, *United States* v. *Walters*, 913 F.2d at 392 ("[a]mid a sea of facts and inferences, instructions are the jury's only compass").

Instruction on the elements is a wholly unsatisfactory substitute for a theory of defense instruction that specifically and precisely informs the jury that good faith is an available defense and enables the jury to recognize and understand the defense theory, test it against the evidence presented at trial, and then make a definitive decision whether, based on that evidence and in light of the defense theory, the defendant is

guilty or not guilty. Far from being superfluous, a good faith instruction serves these essential functions.

Finally, the failure to appreciate the critical role of instructions from the court in the jury deliberations process is bound to result in wrong decisions on related questions of criminal law. A perfect illustration is the failure of the court of appeals in this case to recognize how the jury could have been misled to believe that petitioner's asserted good faith was not to be considered in assessing his culpability as a consequence of the trial court's giving a good faith instruction as to co-defendant Searcy on the charges with which Searcy alone was charged, but pointedly withholding the instruction as to petitioner. If the court of appeals had not improperly discounted the importance of the trial court's charge to the jury and its powerful impact on the deliberations process, it could not have missed this additional and highly prejudicial error growing out of the jury charge. No matter what standard this Court would adopt to resolve the disagreement among the circuits over the instruction issue, petitioner's convictions must be reversed because it is impossible to conclude that the charge as a whole fully and fairly presented his good faith theory of defense to the jury.

* * * * *

In sum, the circuits are hopelessly divided over a fundamental question of federal criminal law as to the adequacy of instructions on a defendant's good faith theory of defense. This case presents an ideal opportunity for the Court to resolve the dispute and to bring certainty and uniformity to this area of law, thereby providing much-needed guidance regarding the specificity required for instruction on good faith and other defense theories.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1992

# APPENDICES

**APPENDIX A**

Filed April 20, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 91-1520

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UNITED STATES OF AMERICA,
*Appellee*

v.

FREDERICK A. GROSS,
*Appellant*

(D.C. Crim. No. 89-00174-01)

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No. 91-1568

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UNITED STATES OF AMERICA,
*Appellee*

v.

WILLIAM MICHAEL SEARCY,
*Appellant*

(D.C. Crim. No. 89-00174-02)

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On Appeal From the United States District Court
For the Eastern District of Pennsylvania

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Argued: February 3, 1992

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Before: BECKER and ROTH, *Circuit Judges*, and McCUNE, *District Judge*.*

(Opinion filed April 20, 1992)

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* Honorable Barron P. McCune, United States District Judge for the Western District of Pennsylvania, sitting by designation.

BECKER, *Circuit Judge*

Defendants Frederick Gross and William Michael Searcy appeal from judgments against them in a criminal case arising from their participation in a scheme to deceive and defraud shareholders of a company in which they were officers. Gross was convicted of one count of conspiring to violate the securities laws, 18 USC § 371 (1988), and two counts of making false statements to the Securities and Exchange Commission ("SEC"), 15 USC §§ 78m(a), 78ff(a) (1988). Although Searcy was acquitted of both conspiracy to violate the securities laws and causing the filing of a false statement with the SEC, he was convicted of two counts of insider trading, see 15 U.S.C. §§ 78j(b) and 78ff( (1988) and two counts of mail fraud, see 18 USC §§ 1341 and 1342 (1988).

On appeal, Gross argues that the district court erred in not instructing the jury that "good faith" was a defense to the crimes with which he was charged. He also claims that the government violated the Jencks Act, 18 USC § 3500 (1988). Finally, he argues that the district court, in sentencing him, contravened FRCrP 32(c)(3)(D). Searcy also presses the Jencks Act claim. In addition, he contends that his convictions should be reversed because his acquittal on the false statements count was inconsistent with a finding of guilt on the remaining charges and because the district court made certain erroneous rulings at trial. For the reasons that follow, we will affirm.

## I. FACTS AND PROCEDURAL HISTORY

Gross was co-founder and Chief Executive Officer of Systems and Computer Technology Corporation ("SCT"), a computer company headquartered in Malvern, Pennsylvania. Searcy was the company's Vice President and one of its Directors. SCT provided computer services to a number of leading American colleges and universities. According to the indictment, Gross and Searcy entered

into a conspiracy (Count One) to artificially inflate the income recognition of SCT in order to make the company's publicly-traded stock more attractive to potential and current shareholders. The conspiracy allegedly arose in 1984 when Gross became concerned about the adverse appearance of the company's financial health and resolved to alter it.

According to the government's evidence, early in 1984, Gross directed employees of SCT to issue so-called "out letters" to individuals who had signed or might sign contracts for the provision of goods and services by SCT. The "out letters" gave the clients the option to escape from what would otherwise be legally binding contracts. Nonetheless, the company's revenue reports, prepared by individuals relying on the contracts alone without knowledge of the "out letters," treated the contracts as if they were binding, thereby falsely inflating the revenues reported in the company's revenue reports.

The government further established that because of Gross's deception, false statements about the company's revenue were included in filings with the SEC for the second (Count Two) and third quarters (Count Three) of 1984. The government contended that Searcy also caused the latter filing. In addition, the government's evidence showed that Searcy traded in SCT stock while aware that the stock's value was inflated by the false statements made in the SEC filings. On August 1 and 2, 1984, after the filing of the Third Quarter Report, Searcy sold SCT stock (Counts Four and Five). On August 3 and 4, 1984, Searcy was mailed brokerage confirmations regarding the sale of his stock (Counts Six and Seven). The scheme was exposed when the auditors for SCT uncovered one of the "out letters," and further investigation unveiled the rest of the deception. The indictments followed.

Gross acknowledged at trial that he had taken many of the actions that the government alleged; nevertheless, he

contended that he had acted without knowledge of the wrongfulness of his actions and that he could not be convicted of the charged crimes because they required knowledge and willfulness, which he did not possess. Consistent with this theory, Gross requested a jury charge which stated that his good faith was a defense to all the crimes with which he was charged. Gross's proposed jury charge read:

> Since an essential element of the crime charged is intent to defraud, it follows that good faith on the part of a defendant is a complete defense to a charge of securities fraud.
>
> A defendant, however, has no burden to establish a defense of good faith. The burden is on the government to prove fraudulent intent and consequent lack of good faith beyond a reasonable doubt.
>
> Even false representations or statements or omissions of material facts do not amount to a fraud unless done with fraudulent intent. However misleading or deceptive a plan may be, it is not fraudulent if it was devised or carried out in good faith. An honest belief in the truth of the representations made by a defendant is a good defense, however inaccurate the statements may turn out to be.

The district court gave this instruction with respect to Searcy on Counts Four through Seven. The court refused, however, to give it with respect to Gross on any of the counts on which he was charged.

Searcy also attempted to demonstrate that he was acting in good faith. He defended himself in part by producing evidence of his good character and arguing that it was inconsistent with the kind of deceptive practice alleged in the indictment. However, Searcy was not allowed to elicit one allegedly important response in this vein, from Peter Walsh, outside counsel for SCT and a government witness at trial. On redirect examination,

the government asked Walsh why Searcy had been chosen to replace another SCT official to deal with questions from the public during the investigation of the SCT scandal. The prosecution withdrew the question, but during a subsequent colloquy, outside the hearing of the jury, Walsh stated that Searcy had been chosen for that job because he was "inteliigent, articulate and a man of integrity." Searcy's counsel sought to have that testimony repeated in front of the jury, but the district court denied the request on the ground that Walsh had already "testified as to his estimate of [Searcy's] character" and because the court believed Walsh was not competent to testify about the motives of people inside SCT.

Searcy also objected to what he claimed was the government's attack in its closing on his character and on that of his counsel. The prosecution made its most damning comment when, in concluding, the prosecutor asked the jury to "end the defense charade, all the posturing, all the lies, and put the blame where it belongs." Defense counsel immediately moved for a mistrial on the ground that the prosecution's statement impugned the integrity of both defense counsel at trial. The district court denied the motion, but instructed the jury to disregard the prosecutor's statement.

As noted above, the jury convicted Gross on the conspiracy count and on both counts of filing of false statements. Searcy was acquitted on the conspiracy charge and on the filing of false statements charge. The jury convicted him, however, on both insider trading counts and on both mail fraud counts.

After trial but before sentencing, it became apparent that the government had not provided defense counsel with all the notes that it had taken of pre-trial investigative interviews of Henry Simmons, SCT's Chief Financial Official and a key government witness at trial. Counsel for Gross and Searcy became aware that not all the notes had been provided when they examined the government's

sentencing memorandum regarding Simmons. That memorandum indicated that there had been thirteen government interviews with Simmons, but counsel for Gross and Searcy had been provided with notes for only six interviews, despite their requests for all Jencks material, including prosecutor's notes of interviews. The Jencks Act requires that district courts "order the United States to produce any statement . . . of the witness in the possession of the United States which relates to the subject matter to which the witness has testified." See 18 USC § 3500(b) (1988).

Upon making this discovery, defense counsel requested that the government provide the notes to them. The government declined initially because it stated that the notes were not notes related to a particular government interview. At a hearing on January 2, 1991, however, the Assistant United States Attorney changed his position and represented that the notes had been destroyed. Then, in February, 1991, the notes reappeared, and the government delivered them to the court for an *in camera* review in order to determine whether they were Jencks material. After its *in camera* review, the district court held that the notes were not Jencks material, and it denied the defendants' request for an adversarial hearing to determine whether these or any other notes had been altered or destroyed.

The presentence investigation report for Gross contained a section entitled "Victim Impact Statement," which purported to detail the various harms that the defendant's crimes had caused. Among other things, the report represented that Gross's crimes had caused SCT's shareholders' stock to decline in value by $140,000,000. Pursuant to FRCrP 32(c)(3)(D), Gross's counsel objected to the inclusion of that figure in the report. The government offered to provide testimony to support the figure, but the district court declined the offer, because, it represented, the determination of sentence would not

be influenced by the $140,000,000 figure. The court entered an order stating, "The Court will not rely upon the $140 million shareholder loss figure cited in the Presentence Report as a basis for sentencing." When the district court sentenced Searcy, however, it stated with regard to Gross, "My decision [not to consider the $140,000,000 figure] did not mean that the enormity of the loss occasioned by the defendant's conduct is not a factor in sentencing." Indeed, in sentencing Gross, the court commented:

> The dimensions of the fraud here were enormous, and the harm that was inflicted on so many people was enormous, and out of that rises a public interest to be vindicated . . .

Because the offense conduct in the case occurred before November 1, 1987, the effective date of the Sentencing Guidelines, the guidelines did not control the district court's sentencing decision. See 18 USC § 3551 (West Supp. 1989). On Count One, the court sentenced Gross to two years imprisonment and a fine of $100,000. On Counts Two and Three, the court suspended imposition of sentence and placed Searcy on two years probation. The court placed Searcy on probation for two and one-half years and ordered him to do two hundred hours of community service. After entry of the judgments, both Gross and Searcy filed timely appeals. We have appellate jurisdiction under 28 USC § 1291 (1988).

## II. FAILURE TO GIVE THE GOOD FAITH INSTRUCTION (GROSS)

We review Gross's claim that the district court erred in refusing to give an instruction on good faith under an abuse of discretion standard. See *United States v Leo*, 941 F2d 181, 200 (3d Cir 1991). We evaluate whether the proffered instruction was legally correct, whether it was not substantially covered by other instructions and whether its omission prejudiced the defendant. *United States v Smith*, 789 F2d 196, 204 (3d Cir 1986).

Gross represents that his only real defense to the government's charges was good faith and that he stressed good faith throughout the presentation of his case and in his closing. He argues that the failure to provide such an instruction therefore deprived him of the defense and constitutes an abuse of discretion. He further claims that the failure to instruct on good faith was uniquely prejudicial in this case because the district court gave the instruction with respect to Searcy on Counts Four through Seven. Gross argues that the good faith instruction given for Searcy suggested, by negative implication, that the defense was not available to Gross. We must first consider whether the failure to give such an instruction, standing on its own, is an abuse of discretion. Then, we must consider whether giving such an instruction with respect to Searcy gave rise to any unique form of prejudice that requires reversal.

A. *Failure to Give a Good Faith Instruction Generally*

Count One, which charged Gross with conspiracy, required the government to show that he "agreed to participate in an unlawful scheme with knowledge of its essential nature." See *United States v Gomberg*, 715 F2d 843, 847 (3d Cir 1983) (citations omitted). Similarly, conviction on the false statements charges required the government to show that Gross acted with knowledge of the wrongfulness of his actions. See *United States v Dixon*, 536 F2d 1388, 1397 (2d Cir 1976). The government thus concedes that if Gross believed that what he was doing was lawful, he could not have been convicted of the crimes with which he was charged. The question for our consideration is whether the failure to instruct specifically on good faith as a defense was an abuse of discretion because, in its absence, the jury may not have recognized that proof of the defendant's bad faith was an element of the crimes with which Gross was charged and had to be proven beyond a reasonable doubt.

The district court's reasons for declining to give Gross's requested instruction on good faith are not clear. At one point, the court appears to have believed that such an instruction was unnecessary. Later, however, in its opinion on post-trial motions, the district court held that it had not committed error in refusing to instruct on good faith because:

> . . . instructions to the jury on the conspiracy count adequately covered both the two objects of the conspiracy and readily cautioned the jury that the government must prove that defendant's joinder in the conspiracy was undertaken knowingly and willfully and with the specific intent to encourage, advise or assist in the furtherance of the unlawful understanding or scheme.

The instructions that the court gave regarding Count I were as follows:

> Before you may find that a defendant has become a member of a conspiracy, the evidence in the case must show beyond a reasonable doubt that the conspiracy was knowingly formed and that the defendant willfully participated in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy.
>
> To act or participate willfully means to act or participate voluntarily and intentionally and with specific intent to do something the law forbids or with specific intent to fail to do something the law requires to be done. That is to say, to act or to participate with a bad purpose either to disobey or disregard the law.

With respect to Counts Two and Three, the district court also instructed on the elements of the crime:

> [Y]ou must find that the defendant knew the statement made or caused to be made was false. An act is done knowingly if done voluntarily and intention-

> ally. The defendant must have been aware of what he was doing and what he was not doing.
>
> . . . [Y]ou must find that if the defendant made or caused to be made a false statement he was acting willfully, that is deliberately or on purpose and not because of mistake, inadvertence or accident.

We must decide whether these instructions, standing on their own, are adequate and serve as a surrogate for the good faith defense instruction, as the government contends, or whether Gross was entitled to a separate instruction stating that if he acted in good faith he could not be convicted.

Although several other circuits have confronted this issue, it is a question of first impression for us. The majority of circuits have held that an instruction setting forth all of the elements of a "knowledge" crime is sufficient and, hence, that a district court does not abuse its discretion in refusing to instruct on the good faith defense. See *United States v McElroy*, 910 F2d 1016, 1025-26 (2d Cir 1990); *United States v Rochester*, 898 F2d 971, 978-79 (5th Cir 1990); *United States v Nivica*, 887 F2d 1110, 1125 (1st Cir 1989); *United States v Green*, 745 F2d 1205, 1209 (9th Cir 1984); *United States v McGuire*, 744 F2d 1197, 1201-02 (6th Cir 1984); *United States v Gambler*, 662 F2d 834, 837 (DC Cir 1981). Two circuits, however, have held that a district court abuses its discretion by refusing to give a good faith defense charge even if the court has already given an instruction on the elements of the crime. See *United States v Casperson*, 773 F2d 216, 223-24 (8th Cir 1985); *United States v Hopkins*, 744 F2d 716, 718 (10th Cir 1984) (en banc).

The majority position derives from the theory that the good faith defense instruction is merely surplusage. Rather than treating good faith as an affirmative defense,

these circuits have viewed the good faith instruction as simply a reiteration that the government must carry its burden in demonstrating that the accused acted knowingly and willfully, because a jury finding that the defendant has acted knowingly and willfully is inconsistent with a finding that the defendant acted in good faith. Thus, according to the majority position, if an instruction already contains a specific statement of the government's burden to prove these elements of the crime, the good faith instruction is simply a redundant version of the instruction on those elements. In contrast, those circuits that have held to the contrary have emphasized that a specific instruction on good faith "directs the jury's attention to the defense of good faith with sufficient specificity to avoid error." *Casperson*, 773 F2d at 223. Under this view, conveying to the jury the essence and context of the good faith defense is of crucial importance.

We are persuaded by the majority view, and agree that a jury finding of good faith is inconsistent with a finding that the defendant acted knowingly and willfully. Therefore, in this case, we conclude that failure to give the instruction on the good faith defense did not constitute an abuse of discretion. By giving a detailed instruction on the elements of the crime with which Gross was charged, the court ensured that a jury finding of good faith would lead to an acquittal. Consistent with our well-established practice of evaluating the jury charge as a whole, we find that the district court's charge was within the bounds of its discretion. See *Ayoub v Spencer*, 550 F2d 164, 168 (3d Cir 1977).

While it was not reversible error for the district court to refuse to give the good faith instruction in this case, we commend to the district judges in the exercise of their discretion its use as a supplement to the "knowing and willful" charge in future cases.

B. *Failure to Instruct on Good Faith With Respect to Gross But Not Searcy*

Gross contends that even if it is not error to refuse to give a good faith instruction in a normal case, it was error to refuse to give such an instruction in this case with respect to Searcy and not Gross. When charging the jury on Counts Four through Seven, with which only Searcy was charged, the district court gave the good faith instruction that Gross had requested on Counts One through Three. Gross argues that giving such an instruction strongly suggested that the good faith defense was available to Searcy, but not available to Gross, and that the suggestion was heightened by the fact that the district court, at numerous points during its instruction, specifically cautioned that those instructions given with respect to Gross only applied to Gross and those instructions given with respect to Searcy only applied to Searcy.

The government responds by pointing out that Searcy, who was also charged with Counts One through Three, was deprived of a charge on good faith with respect to those counts. The charge on good faith for Searcy came only with respect to Counts Four and Five, with neither of which Gross was charged. The government thus contends that no negative implication could have arisen when neither defendant received the good faith instruction on the crimes with which both defendants were charged.

While Gross has made a strong argument about the dynamics of jury perception and deliberation, the government's argument also has much force and persuades us that the jury was not misled. Moreover, as we have explained above, we do not believe that the jury, following the instructions given by the court, would have convicted Gross had it believed he acted in good faith. Therefore, we do not believe that the district court abused its discretion or acted in a manner that resulted in prejudice to Gross, and we find no reversible error in the district court's failure to give a good faith instruction in this case.

## III. FAILURE TO DISCLOSE JENCKS MATERIAL (GROSS AND SEARCY)

### A. *Introduction*

Well after the trial was over, the government provided the district court with several pages of notes concerning interviews with its witness Simmons that the government had not previously supplied to the court or to the defendants. Gross and Searcy urge that the government's failure to provide notes concerning seven interviews with government witness Simmons prior to trial violated the Jencks Act, see 18 USC § 3500 (1988), and deprived defendants of their right to put on a defense.

Defendants sought a hearing to explore whether the notes of interviews with Simmons were in fact Jencks material and whether or not the government (or anyone else) had destroyed Jencks material. Defendants requested that the hearing be adversarial because, they argued, the circumstances surrounding the temporary disappearance of the notes were highly suspicious. Defendants contended before the district court and urge on appeal that the notes presented to the district court may have been altered by the government or by others during the time when the government was unaware of the notes' location. Further, defendants argue that since the notes were temporarily mislaid, portions of the notes may have been destroyed or lost. The district court, exercising its discretion, rejected the defendants' request for an adversary hearing and held a hearing *in camera*, at which the court determined that the materials need not be disclosed to defendants under the Jencks Act. Defendants now urge that that decision was reversible error.

Our consideration of this issue involves two levels of analysis. First, we must consider whether the material sought by the defendants is the kind of material that the government is required to disclose to defendants un-

der the Jencks Act. Second, we must consider whether the circumstances surrounding the notes' disappearance is sufficiently suspect to merit a hearing to determine whether any potential Jencks material was altered or destroyed.

B. *Was the Material Sought Jencks Act Material?*

We review the district court's finding that the evidence was not Jencks material and the district court's decision to hold an *in camera* hearing under an abuse of discretion standard. See *Palermo v United States*, 360 US 343, 79 S Ct 1217, 1226 (1959).

The Jencks Act requires that three kinds of witness statements within the possession of the government must be made available to the defendant:

> (1) a written statement made by said witness and signed or otherwise adopted by him;
>
> (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or
>
> (3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

18 USC § 3500(e).

As the Supreme Court recognized shortly after the enactment of the Jencks Act, the Act itself provides no procedure for determining whether material sought by the defendants falls within any of these categories. See id. at 1225. The Court therefore suggested an *in camera* review procedure which would serve the purposes of the Act, which it construed as "limiting and regulating defense access to government papers." Id. Pursuant to the Court's command in *Palermo*, district courts have en-

forced the Act by having the government submit statements requested by defendants to the court for *in camera* review outside the presence of counsel.

Experience has shown that in the vast majority of cases, submission of the material for *in camera* review is adequate to determine whether the materials are the kinds of statements that must be revealed to the defense under the Jencks Act. See *Twentieth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals*, 79 Georgetown L J 591, 814-15 (1991) (discussing cases). The district court also decides "what, if any, evidence extrinsic to the statement itself may or must be offered to prove the nature of the statement." *Palermo*, 79 S Ct at 1226. If the court believes that such extrinsic evidence is necessary to determine whether the statement is in fact Jencks material, it may hold a hearing to elicit such evidence. In this case, the court chose only to look at the statements themselves to determine whether they were Jencks material.

We have also reviewed the requested notes *in camera*. We first consider whether the statements, in the condition in which we have viewed them, constitute Jencks material. Clearly, the prosecutor's notes from his interviews with Simmons were not a record of Simmons's testimony before the grand jury, and, hence, they need not be revealed under § 3500 (e)(3). We therefore need only decide whether they are statements made and adopted by the witness or a substantially verbatim recital of oral statements made by the witness.

We find, based on our review both of those materials and of the record, that the district court did not abuse its discretion in finding that the notes from the Simmons interviews were not statements made or adopted by Simmons. Nothing about the notes indicates that Simmons adopted them as his own statement. Further, the record demonstrates that both the prosecutor handling the interview and the witness, Simmons, made affidavits stating

that Simmons did not adopt any of the prosecutor's notes as statements of his own. Based on this evidence, we hold that the district court did not abuse its discretion in finding that the materials did not constitute materials covered by 18 USC § 3500 (e)(1).

Nor did the district court err in determining that the Simmons notes were not a "substantially verbatim" recital of statements made by Simmons to prosecutors. See 18 USC § 3500 (e)(2). For the most part, the notes reflect the prosecutor's reactions to the witness rather than a direct quotation of what the witness said. A review of the Simmons notes demonstrates that they do not resemble a verbatim transcript but rather are a short summary of information that Simmons was providing. Although, as the district court observed, the notes may occasionally reflect precise phrases used by the witness, the presence of such brief quotations is inadequate to qualify the notes as Jencks material. See *United States v Cuesta*, 597 F2d 903, 914 (5th Cir 1979) (finding notes were not Jencks material even if they contained some verbatim recitations of phrases used by the interviewee). Therefore, we will affirm the district court's holding that the Simmons notes turned over to the court post conviction are not Jencks material.

C. *Did the Government's Conduct in this Case Require an Adversary Hearing?*

Defendants argue that, even if the Simmons notes now in our possession appear not to be material that requires disclosure, we should, nonetheless, remand for an adversarial hearing so that the district court can determine whether any additional evidence was destroyed or whether the evidence presently in our possession was tampered with. Their overarching contention is that the government's peculiar behavior regarding the Simmons notes suggests the government may have altered or completely rewritten them. The government did initially report that it had interviewed Simmons fewer times than it actually

had; then the government represented that the notes from the initial interviews had been destroyed; finally, the government indicated that it had found the notes, and it turned them over to the court. Alternatively, defendants argue that this chain of events at least suggests that the government was not aware where the notes were for a substantial period of time, during which time the notes may have been tampered with or some portion of them lost. Again, we review the district court's decision to deal with this matter via an *in camera* hearing under an abuse of discretion standard. See *Palermo v United States*, 360 US 343, 79 S Ct 1217, 1225-26 (1959).

In formulating their request for a hearing on the Simmons notes, defendants rely on *Campbell v United States*, 365 US 85, 81 S Ct 421 (1961). In *Campbell*, a witness testified that a government agent had recorded in writing a statement that the witness adopted as his own. The prosecutor, when asked about the statement, represented that he was unaware of it. The district court held a hearing, but declined to require the government to produce the testimony of a special agent who had prepared an interview report of the witness during the investigation. The Supreme Court held that the failure to require the special agent's testimony at an adversarial hearing was error and that, to ensure fairness to the defendant, the district court was required to produce the testimony of the special agent.

The circumstances of this case are much different from those in *Campbell*. There, the witness stated that he had adopted a statement that was in the government's possession but that had not been produced to the defendant after a Jencks Act request. In this case, the witness (Simmons) has sworn that he never adopted any of the government's written statements as his own. Further, review of the interview notes themselves reveals that they do not fall within any of the categories of statements that the Jencks Act requires must be revealed to defendants.

Defendants' suggestion that the notes may have been tampered with is merely conclusory and speculative. At all events, the contention was properly evaluated in the *in camera* proceeding before the district court by careful examination of the notes, and our review suggests the same result. Defendants have offered no plausible theory of destruction or alteration of evidence that would merit holding that the district court abused its discretion in this case. Therefore, we will affirm the district court's holding that the Jencks Act did not require disclosure of the Simmons notes and that a hearing was not required.

## IV. THE ALLEGED INCONSISTENCY OF VERDICTS (SEARCY)

Searcy was acquitted on Count Three, which charged him with knowingly causing the filing of a false statement with the SEC, but convicted on Counts Four and Five, which charged insider trading, and on Counts Six and Seven, which charged mail fraud. Searcy notes that all five of these crimes involved the same level of intent, i.e., the defendant had to perform the acts knowingly and willfully. He argues that his acquittal on Count Three demonstrates he did not have the requisite knowledge and willfulness required to convict on the remaining counts, that the verdicts are inconsistent, and that his conviction on Counts Four through Seven must therefore be set aside.

We find this argument without merit for two reasons. First, contrary to Searcy's suggestion, the jury may have acquitted Searcy because it believed that the government had failed to demonstrate one of the elements required to prove the filing of a false statement other than knowledge and willfulness. For example, as the district court noted, the government may have failed to make the required showing that Searcy "caused" the false statements to be filed. Searcy urges that the jury could not have failed to find that he caused the false filing because

Searcy approved the filing at a meeting of SCT's Board of Directors on August 2, 1984, the day immediately preceding those on which he engaged in mail fraud and insider trading. We agree with the district court, however, that the jury may not have interpreted Searcy's presence at the Board of Directors meeting and his approval of the report as sufficient to demonstrate that he "caused" the statements to be filed. We note in this regard that Searcy had a lesser role in the corporate hierarchy than Gross did. For these reasons, we reject Searcy's contention that the verdicts are inconsistent.

Even were we to agree with Searcy, however, that an inconsistency exists, this conclusion would not merit reversal of his convictions. In *United States v Powell*, 469 US 57, 105 S Ct 471, 477-78 (1984), the Supreme Court rejected a defendant's argument that her acquittal on one count, which was inconsistent with another count on which she was convicted, entitled her to a reversal of her conviction. The Court noted that inconsistent verdicts are often "a product of jury lenity." Id at 477. Consequently, the Court held that the inconsistency between the acquittal and the conviction did not require a reversal of the conviction.

The Court did note an exception in *Powell* for those situations where "a defendant is convicted of two crimes, where a guilty verdict on one logically excludes the other." Id at 479 n9. Searcy argues that the logical underpinning of this exception is that inconsistent findings by a jury cannot be allowed to stand. We disagree. The exception only operates in those situations where a jury has convicted a defendant of two crimes and those *convictions* are mutually exclusive. Such a result would be patently unjust because a defendant would be convicted of two crimes, at least one of which he could not have committed. Here, Searcy is arguing that an *acquittal* is inconsistent with four convictions. As *Powell* makes clear, inconsistency between acquittals and convictions may re-

sult from jury lenity and does not merit reversal of the convictions. Therefore, we hold that Searcy's argument is foreclosed by *Powell* and his convictions, even if inconsistent with his acquittal, must be sustained.

## V. SEARCY'S ALLEGATIONS OF TRIAL ERROR

### *A. Testimony of Peter Walsh*

At trial, the government called Peter Walsh, outside counsel to SCT during the time of the conspiracy, as a witness to testify about the deceptions foisted on him by many of the principals of SCT. Walsh testified that SCT officials had concealed the "out letters" from him. On cross-examination by Searcy's counsel, however, Walsh testified that in his dealings with Searcy, he found Searcy to be truthful and honest. On redirect examination, the government asked Walsh why SCT had designated Searcy as the individual in charge of dealing with the media in the wake of revelations about the SCT scandal. Before Walsh could answer the question, the government withdrew it. Counsel for Searcy requested that Walsh be allowed to answer the question, and outside the hearing of the jury, Walsh stated that he believed Searcy was given that position because people in SCT perceived him as an honest and trustworthy individual. Searcy's counsel then sought to have Walsh answer the question that the government had withdrawn. The court denied the request because (1) the witness could not state the basis for his belief that Searcy was viewed by others as an honest and trustworthy individual, and (2) the court believed that Walsh had already testified about Searcy's character.

Searcy argues that the exclusion of this evidence contravened FRE 405 (a), which provides:

> In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or

> by testimony in the form of opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

Searcy contends that Walsh was precluded from testifying about a character trait of Searcy's that was critical to his defense. We review the district court's decision not to admit Walsh's answer under an abuse of discretion standard. See *United States v Leo*, 941 F2d 181, 196 (3d Cir 1991).

The question that the government asked Walsh was:

> Do you know those other reasons [for putting Searcy in charge of public relations], could you tell us what those other reasons are?

This question plainly does not ask for Walsh's testimony as to reputation or for opinion testimony. Rather, it asks Walsh to describe the motives of other individuals [those inside SCT] for putting Searcy in charge of dealing with the public. No evidence showed that Walsh was competent to testify as to the motives of those other individuals. Even assuming that the question had been phrased to elicit Walsh's opinion, however, such testimony would have been redundant of his prior testimony that Searcy was truthful and a man of integrity, and the court need not have admitted such cumulative evidence. See *United States v Sullivan*, 803 F2d 87, 89 (3d Cir 1986). Whichever the case, the district court did not abuse its discretion in refusing to allow counsel to elicit this response from Walsh in front of the jury.

*B. The Prosecutor's Closing Argument*

Searcy also argues that the prosecutor's closing argument cast aspersions on defense counsel by suggesting that counsel for both Gross and Searcy were lying to the jury, and that this characterization prevented him from getting a fair trial. See *United States v McLain*, 823 F2d 1457, 1462 (11th Cir 1987) (reversing conviction

where prosecutor in closing had discredited defense counsel in front of the jury).

At the end of his closing, the prosecutor stated:

> In conclusion, ladies and gentlemen, I'd like to ask you to end the defense charade, all of the posturing, all of the lies, and put the blame where it belongs—

At that point, the court intervened and prevented the prosecutor from continuing in this vein. The court also instructed the jury to disregard the comments about charades and lying.

Although the government should have avoided this kind of comment in its closing, we believe that, in context, the comment clearly referred to the credibility of the defendants' testimony and not to defense counsel. The government made this comment immediately after summarizing the testimony of Searcy, which it was characterizing as incredible. Also, immediately after making the comment, the government asked the jury to put the blame on the defendants. Nowhere in this portion of the closing did the government refer to defense counsel.

Given our satisfaction that the comments referred to the defendants and not to defense counsel, we must decide whether the government's characterization of the defendants as "liars" and "charaders" prejudiced the defendants sufficiently to warrant a new trial. In *United States v Swinehart*, 617 F2d 336, 339 (3d Cir 1980), we held that a prosecutor's statement regarding the credibility of a witness can constitute grounds for reversal only if the defendant can show that he was prejudiced by those comments. Here, the government made the comment at the end of its effort to discredit Searcy's testimony. The comment did not suggest that the prosecutor had any knowledge of the evidence other than what was presented to the jury. See *United States v Gallagher*, 576 F2d 1028, 1043 (3d Cir 1978). Instead, it merely suggested that the government believed that it had success-

fully cast doubt on Searcy's testimony by its summary of his testimony.

Finally, we note that the district court instructed the jury to disregard the comments, which further weakens Searcy's argument that prejudice resulted from the government's comment. Although, in some instances, a cautionary instruction will be insufficient to overcome the prejudice created by a prosecutor's comment, in this case we believe that instruction was sufficient.

In sum, we do not believe that Searcy has demonstrated the requisite prejudice to be granted a new trial.

## VI. WAS RULE 32 (C) (3) (D) VIOLATED IN THE SENTENCING OF GROSS?

Finally, we consider Gross's argument that he was sentenced on the basis of evidence that the district court had specifically foresworn reliance on, in contravention of FRCrP 32 (c) (3) (D). The rule specifies:

> If the comments of the defendant and the defendant's counsel or testimony or other information introduced by them allege any factual inaccuracy in the presentence investigation report or the summary of the report or part thereof, the court shall, as to each matter controverted make (i) a finding as to the allegation, or (ii) a determination that no such finding is necessary because the matter controverted will not be taken into account in sentencing. A written record of such findings and determinations shall be appended to and accompany any copy of the presentence investigation report thereafter made available to the Bureau of Prisons or the Parole Commission.

In this case, the presentence investigation report included a section entitled "Victim impact Statement," in which the government contended that, as a result of Gross's activity, the shareholders of SCT had suffered

collective losses of $140,000,000. Gross's counsel made a formal motion to correct the presentence report, pursuant to Rule 32, in which counsel stated that that figure was inaccurate and requested that the court make a finding that the figure was inaccurate. The government offered to provide evidence to demonstrate that $140,000,000 was an accurate estimate of the losses suffered by shareholders of SCT. Although a civil suit in connection with the securities violation had been settled for $13,000,000, the government stated that it was prepared to adduce evidence that actual losses in fact were $140,000,000.

The district court entered an order approximately nine months prior to sentencing stating that it would "not rely upon the $140 million shareholder loss figure cited in the Presentence report as a basis for sentencing." The court therefore declined to hear the government's testimony about the amount of loss caused by Gross. The court stated at a sentencing hearing held immediately prior to the issuance of its order:

> All right. Counsel, I will not hear the testimony which the government offers for the following reaons. It does not seem to me appropriate to adopt the Government's theory of restitution. First, because there was a civil action that we settled. And secondly, perhaps more importantly, because I think it would be a violation of due process to impose restitution with respect to the amount of loss sustained by any victim in the words of the statute without affording the defendants the right to try what would have been at least the damages side of this civil action. I do not consider—while I'm sure the defendants' acts caused damage, I do not consider that I have before me without a due process hearing on that subject "the amount of loss sustained by any victim as a result of the offense." Obviously various questions would come up as to when the purchases

> were made, when the sales were made, if made, reliance and all these other questions.
>
> In addition with respect to Mr. Scarcy, he was acquitted of the conspiracy count. And as to the count as to which he was convicted, I'm satisfied the SEC proceedings will result in the appropriate disgorgement, if any, that is required. With respect to its influence on the remaining part of the sentence, I do not need the testimony because its—I do not—I consider that both Mr. Gross and Mr. Searcy have been convicted of, in Mr. Searcy's case a serious offense, in Mr. Gross's case several serious offenses. But I do not think my—the sentence that's ultimately determined for those offenses will be influenced by whether the amount of harm alleged to have occurred as a result of the offenses is 10 or 15 million or 140 million.

Consequently, defense counsel and the government proceeded to sentencing on the understanding that the district court would not rely on the $140,000,000 figure.

There was approximately a nine-month delay between this hearing on the amount of loss in September, 1990 and the final sentencing hearing in June, 1991 due in part to the controversy about the Jencks material discussed above. After sentencing Gross, the district court stated:

> The dimensions of the fraud here were enormous and the harm that was inflicted on so many people was enormous, and out of that rises a public interest to be vindicated which cannot be overcome by [participation in a community service project.

The court did not mention the $140,000,000 figure. Gross now contends that the district court implicity relied on that figure during its sentencing, although it did not refer to it explicitly. He argues that such reliance was

error given that the court had specifically indicated it would disregard the figure.

We have made clear that Rule 32(c)(3)(D) requires the district court to make a finding as to disputed facts, see *United States v Gomez*, 831 F2d 453, 455 (3d Cir 1987), and if the district court does not make such a finding, it is obligated not to rely on the fact in dispute. See *United States v Blanco*, 884 F2d 1577, 1583 (3d Cir 1989). Our review of the district court's determination in this regard is plenary. See *United States v Furst*, 918 F2d 400, 406 (3d Cir 1990).

Nothing in the record before us indicates that the district court relied on the $140,000,000 in sentencing Gross. Gross's argument ignores the ample and uncontradicted evidence in the record which demonstrated that his actions had caused substantial financial loss. As we have noted, a civil suit related to the SCT scandal had settled for $13,000,000, and other evidence indicated that the actual loss may have been greater, even if substantially less than $140,000,000. Gross never objected to the inclusion of evidence related to these lesser figures in the pre-sentence investigative report. Indeed, his own motion to contest the $140,000,000 figure conceded that he had agreed to pay the $13,000,000 figure in settlement of a civil suit.

While the district court's rationale is not entirely clear, it appears from the colloquy cited above that the court was relying on the undisputed amount paid out in settlement of the civil action in this case. The essence of the court's statement is encapsulated in the observation that the sentence would be no different if the amount of loss were 10 or 15 million or 140 million. Given the magnitude of a $10,000,000 loss, that statement seems reasonable, and we accept it. Therefore, given that the district court did not rely on the $140,000,000 figure, there was no violation of FRCrP 32(c)(3)(D).

## VII. CONCLUSION

Because all defendants' contentions are without merit, the judgments of sentence against both Gross and Searcy will be affirmed.

## APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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Criminal Action No. 89-00174-01

UNITED STATES OF AMERICA

v.

FREDERICK A. GROSS

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MEMORANDUM

O'NEILL, J. June 8, 1990

I. *Introduction.*

On February 16, 1990, following a six week trial, a jury convicted Frederick A. Gross of three crimes. The jury found Gross guilty of conspiring to violate the securities laws of the United States in violation of 18 U.S.C. § 371, and of two counts of making a false statement as to material facts to the Securities and Exchange Commission in violation of 15 U.S.C. § 78(ff)(a) and 17 C.F.R. 240.13a-3. The jury acquitted Gross's codefendant, William Searcy of conspiring to violate the securities laws of the United States and of making a false statement of material facts to the SEC, but convicted Searcy of two counts of insider trading in violation of 15 U.S.C. § 78j(b), 78ff and 17 C.F.R. § 240.10b-5, and two counts of mail fraud in violation of 18 U.S.C. § 1341.[1]

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[1] The Superseding Indictment also charged Gross in Counts Two and Three with aiding and abetting in violation of 18 U.S.C. § 2,

Gross has moved for entry of a judgment of acquittal or, in the alternative, for a new trial.[2] For the reasons set forth below, this motion will be denied.

## II. *Discussion.*

### A. *Motion for Acquittal.*

Under Federal Rule of Criminal Procedure 29(a), a motion for a judgment of acquittal should be granted "if the evidence is insufficient to sustain a conviction." Insufficiency of the evidence is the sole ground upon which a motion for acquittal may be granted. *United States v. Clemons*, 658 F. Supp. 1116, 1118 (W.D. Pa. 1987), *aff'd*, 843 F.2d 741 (3d Cir. 1988). In deciding a motion for acquittal, I give substantial deference to the jury's verdict. The Court of Appeals for the Third Circuit has stated:

> [T]he trial court [is] required to view the evidence in the light most favorable to the prosecution and to draw all reasonable inferences therefrom in the government's favor. Viewing the evidence in this light, the trial court is obliged to uphold the jury's verdict unless no rational jury could conclude beyond a reasonable doubt that [the defendant was guilty].

*United States v. Ashfield*, 735 F.2d 101, 106 (3d Cir. 1984) (citations omitted). *See also United States v. Villard*, 885 F.2d 117, 120 (3d Cir. 1989); *United States v. Martorano*, 596 F. Supp. 621, 624 (E.D. Pa.), *aff'd* 767 F.2d 63 (3d Cir. 1984). Moreover, the trial judge "is not to weigh the evidence or assess the credibility of

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and Searcy in Counts Three through Seven with aiding and abetting in violation of 18 U.S.C. § 2. The government withdrew these charges prior to the closing arguments in the case.

[2] Searcy has also moved for judgment of acquittal or, in the alternative, for a new trial. In a separate Memorandum and Order of this date, I have denied Searcy's motion.

witnesses when it judges the merits of a motion for acquittal." *Burks v. United States*, 437 U.S. 1, 16 (1978).

I have reviewed the evidence the government presented at trial and conclude that it was sufficient for the jury to conclude that Gross conspired to violate the securities laws of the United States and that Gross filed or caused to be filed false statements with the SEC concerning SCT finances for the second and third quarters of fiscal year 1984. Therefore, Gross's motion for judgment of acquittal must be denied.

B. *Motion for New Trial.*

Gross has moved in the alternative for a new trial. Gross maintains that he is entitled to a new trial because of three errors. First, Gross contends that the joinder of his trial with that of his codefendant William Searcy deprived him of a fair trial. Second, Gross argues that the prosecuting attorney's rebuttal summation included improper and highly prejudicial argument. Finally, Gross asserts that despite his requests I improperly refused to charge the jury on an essential element of his defense. Gross contends that these errors substantially prejudiced his defense and require a new trial. Federal Rule of Criminal Procedure 33 provides that I may grant a new trial "if required in the interest of justice." For the reasons set forth below, I conclude that Gross's motion for a new trial is without merit.

1. *Severance.*

Prior to trial, Gross moved to sever his case from that of his codefendant, William Searcy.[3] ~~By~~ Memorandum

[3] Gross's pre-trial motion to sever argued that the government intended to introduce at trial certain testimony concerning out-of-court statements made by Searcy. This testimony would be admitted against Searcy as non-hearsay admissions of a party opponent under Federal Rule of Evidence 801(d)(2)(A), but would be inadmissible against Gross. Gross argued that such testimony

and Order dated December 28, 1989, I denied the motion. Rule 14 of the Federal Rules of Criminal Procedure provides:

> If it appears that a defendant or the government is prejudiced by a joinder of defendants in an indictment . . . or by such joinder for trial together, the Court may . . . grant a severance of defendants or provide whatever relief justice requires.

It is well established that judicial economy favors a joint trial when defendants are jointly indicted, *United States v. Simmons*, 679 F.2d 1042, 1051 (3d Cir. 1982), *cert. denied*, 462 U.S. 1134 (1983), and where, as in this case, defendants are charged with a single conspiracy. *United States v. Dickens*, 695 F.2d 765, 778-79 (3d Cir. 1982), *cert. denied*, 460 U.S. 1092 (1983). *See also United States v. Sandini*, 888 F.2d 300, 305 (3d Cir. 1989), *cert. denied*, 110 S.Ct. 1831 (1990).

The decision to grant or deny a motion for severance under Rule 14 is within the sound discretion of the trial Court. *Id.; United States v. Reicherter*, 647 F.2d 397, 400 (3d Cir. 1981); *United States v. Cole*, 717 F. Supp. 309, 318 (E.D. Pa. 1989). A defendant is entitled to a severance under Rule 14 only if "clear and substantial" prejudice results from a joint trial. *United States v. Gorecki*, 813 F.2d 40, 43 (3d Cir. 1987); *United States v. Sebetich*, 776 F.2d 412, 427 (3d Cir. 1985), *cert. denied*, 484 U.S. 1017 (1988); *Cole*, 717 F. Supp. at 318. "[D]efendants are not entitled to a severance merely because the evidence may be more damaging against a co-defendant and there is danger of spillover." *United States v. DiPasquale*, 561 F. Supp. 1338, 1347 (E.D. Pa. 1983),

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required a severance under *Bruton v. United States*, 391 U.S. 123 (1968). Gross has not pursued this issue post-trial, presumably because Searcy testified at the trial. Gross's counsel engaged in extensive cross-examination of Searcy and had ample opportunity to pursue any of the statements the government witnesses attributed to Searcy.

*aff'd*, 740 F.2d 1282 (3d Cir. 1984), *cert. denied*, 469 U.S. 1228 (1985).

A Court must sever the trials of codefendants with mutually antagonistic defenses if severance is necessary to preserve each defendant's right to a fair trial. *United States v. Aguiar*, 610 F.2d 1296, 1302 (5th Cir.), *cert. denied*, 449 U.S. 827 (1980); *United States v. Van Horn*, 789 F.2d 1492, 1505 (11th Cir. 1986), *cert. denied*, 479 U.S. 854 (1986); *United States v. Garcia Fernandez*, 658 F. Supp. 41, 43 (E.D. Pa. 1987), *aff'd*, 838 F.2d 1207 (3d Cir. 1988). However, antagonistic defenses are sufficiently prejudicial only when they are irreconcilable and mutually exclusive. *United States v. Provenzano*, 688 F.2d 194, 198 (3d Cir.), *cert. denied*, 459 U.S. 1071 (1982); *Garcia-Fernandez*, 658 F. Supp. at 43. "[T]he mere presence of hostility among defendants or the desire of one to exculpate himself by inculpating another have both been held insufficient grounds to require separate trials." *United States v. Barber*, 442 F.2d 517, 530 (3d Cir.), *cert. denied*, 404 U.S. 846 (1971); *United States v. De Luna*, 763 F.2d 897, 921 (8th Cir.), *cert. denied*, 474 U.S. 980 (1985). "Thus antagonistic defenses do not require the granting of a severance even when one defendant takes the stand and blames his co-defendant for the crime." *United States v. McPartlin*, 595 F.2d 1321, 1334 (7th Cir.) (citations omitted), *cert. denied*, 444 U.S. 833 (1979); *DeLuna*, 763 F.2d at 921. *See also United States v. Haldeman*, 559 F.2d 31, 71 (D.C. Cir. 1976) (en banc), *cert. denied*, 431 U.S. 933 (1977).

Gross contends that he was the victim of inconsistent, antagonistic defenses and of prejudicial spillover from the government's case against Mr. Searcy. He argues that by accepting Searcy's defense to the conspiracy and false filing charges, the jury was compelled to find Gross guilty. Specifically, Gross asserts that Searcy defended the case by claiming that he was an innocent bystander to the events in question: he had no responsibility for revenue recognition and sold his stock solely in an effort to di-

versify his portfolio and achieve financial security. Searcy also testified that he was unaware of the existence of "out-letters" until the "midnight raid," Transcript of February 6, 1989, afternoon session, at 125, and never sent letters to clients containing the "null and void" language. Transcript of February 6, 1989, afternoon session, at 112.

Gross asserts that Searcy's claims directly contradicted the Gross defense that the use of "comfort" had been a longstanding and open practice at SCT, that the letters exchanged with clients in 1984 were not hidden from anyone, including Mr. Searcy, and that Gross believed in good faith that his clients had made commitments notwithstanding that certain conditional language was contained in the letters. Gross therefore concludes that the testimony of his codefendant severely undercut his defense.

I decline to accept Gross's argument. Searcy's defense was that he had no knowledge of the improper booking of revenue. At no point during his testimony did Searcy state or imply that Gross had such knowledge, nor did his counsel's presentation of his defense make such allegations, either expressly or impliedly. Searcy's defense, therefore, did not confirm the existence of the conspiracy, but instead disavowed knowledge of any conspiracy. In fact, in finding Searcy guilty on Counts Four through Seven, the jury rejected Searcy's testimony concerning his lack of knowledge of the "out-letters" and of the overstatement of SCT revenues. That testimony could not have prejudiced Gross. Searcy's defense did not require the jury to convict Gross and did not deprive Gross of his right to a fair trial.

Gross also argues that he suffered unfair prejudice because of the spillover effect of the evidence the government offered to prove Searcy's alleged inside trades. This argument is without merit. In those cases in which evidence was admitted solely against one defendant, I instructed the jury to that effect at the time the evidence was adduced. Similarly, during my charge I instructed

the jury to consider each count of the indictment separately, to give separate consideration to the case of each defendant and that evidence admitted solely against one defendant must not be considered against the other defendant. *See* Transcript of February 13, 1990, afternoon session, at 89, 90, 104, 106, 109 and 124. As the jury is presumed to have followed these instructions, *see Richardson v. Marsh*, 481 U.S. 200, 211 (1987); *United States v. Lane*, 883 F.2d 1484, 1498 (10th Cir. 1989); *United States v. Potamitis*, 739 F.2d 784, 790 (2d Cir. 1984), I conclude that the spillover of evidence, if any, did not prejudice Gross.

Finally, Gross asserts that the government failed to present its case in a manner that permitted the jury to compartmentalize the evidence against each defendant. In my Order dated December 28, 1989 which denied Gross's pre-trial motion for severance, I accepted the government's proposal to redact the testimony of its witnesses to avoid any potential problems under *Bruton v. United States*, 391 U.S. 123 (1968). *See* Memorandum and Order of December 28, 1989, at 5-6, *citing Richardson*, 481 U.S. at 208-09, 211. Gross claims that the government failed to comply with this direction. This argument is without merit.

Gross claims that the testimony of Donald Jefferis violated my December 28, 1989 Order. Jefferis testified, in pertinent part, as follows:

> Q: Did you ask Mr. Searcy during these quarterly end discussion something to the effect of where are you going to get the numbers this quarter?
>
> A: As we went through '84, 1984, it got tougher and tougher to make the numbers, obviously. The end of the third quarter in roughly the first week of July when you're going through that second week in July, you could—I knew the number, and I forget the exact number because you're talking five years ago,

> I knew that the number that had to be made was like nine million and the sales that had been, that I was able to count on my fingers, was like four million, so where do you get the numbers.
>
> Q: Was that a question that you asked?
>
> A: And so the first day I asked where are you going to make the—where are you going to get the—the numbers and —.
>
> Q: Did Mr. Searcy—
>
> A: —his answer was basically "I don't know." The second day Fred when had accepted the presentation that night, this was always done at night after they got the numbers together, and I said "where did you get the numbers; how did you make it?" And he said "You don't want to know, D.J., you just don't want to know." He called me D.J.

Gross contends that this passage contained hearsay that was inadmissible in Gross's trial. I disagree.

Jefferis did not attribute his statement that "Fred had accepted the presentation" to Searcy or to any other declarant. As the statement was based on Jefferis' personal knowledge of SCT's business operations, it was not hearsay, *see* F.R.E. 801(c), and did not fall within the prohibitions of *Bruton*.[4] Jefferis' testimony did not prejudice or incriminate Gross.[5]

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[4] Gross's contention that Jefferis' statement placed the crucial decision-making with respect to revenue recognition in Gross's hands is incorrect. The statement only reveals that Gross accepted a presentation. It did not facially incriminate Gross in violation of *Bruton*. Any speculation regarding the meaning of that statement would adopt a "contextual implication" expansion of *Bruton*. The Supreme Court, *citing United States v. Belle*, 593 F.2d 487, 493-95 (3d Cir. 1979) (en banc), expressly rejected such an expansion in *Richardson, supra*.

[5] At the time Jefferis made the allegedly improper statements, I found that any statements Jefferis attributed to Searcy were

2. *Prosecutor's Rebuttal Comments.*

Gross contends that during rebuttal argument the prosecutor made a plea to the jury to consider the defense effort at trial as evidence of Gross's purported guilt. In his rebuttal the prosecutor stated: "In conclusion, ladies and gentlemen, I'd like to ask you to end the defense charade, all the posturing, all the lies, and put the blame where it belongs, put the blame on—." Transcript of February 13, 1990, morning session, at 72. Gross argues that the prosecutor's remark constituted reversible error because it improperly focussed the jury's attention on the actions of defense counsel. I reject this characterization of the remarks. I held at the time that these remarks were directed to the defendants' testimony at the trial, and were not a characterization of the conduct of Gross's counsel. Transcript of February 13, 1990, morning session, at 73.[6] Having reviewed the transcript of the proceedings and the context in which the prosecutor made the statement, I reach the same conclusion. I hold that these remarks were not improper and do not require a new trial. *See United States v. Hoekler*, 765 F.2d 1422, 1426 (9th Cir. 1985), *cert. denied*, 475 U.S. 1024 (1986); *United States v. Birges*, 723 F.2d 666, 671-72, n.1 (9th Cir.), *cert. denied*, 469 U.S. 863 (1984).

3. *Gross's Requested Point for Charge.*

Gross argues that I committed error in refusing to give his proposed instruction to the jury concerning his defense of "good faith" to Count One. In judging the

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admissible under F.R.E. 801(d)(2)(E) as a statement of a co-conspirator made in furtherance of the conspiracy. I found that Searcy's statements were an attempt to conceal the ongoing conspiracy in furtherance of its main objective—to inflate the value of the corporation's stock. I believe that this ruling was correct. *See Gruenwald v. United States*, 353 U.S. 391, 405 (1957); *United States v. Davis*, 623 F.2d 188, 191-92 (1st Cir. 1980).

[6] I also immediately instructed the jury to disregard the remarks. Transcript of February 13, 1990, morning session, at 73.

adequacy of my charge, I view the instructions in their entirety and consider their general effect. *See United States v. Bey*, 736 F.2d 891, 896 (3d Cir. 1984); *Ayoub v. Spencer*, 550 F.2d 164, 168 (3d Cir.), *cert. denied*, 432 U.S. 907 (1977). I am not required to use a defendant's requested charge so long as my language is sufficient to fairly and adequately present the issue to the jury. *See, e.g., Link v. Mercedes-Benz of North America, Inc.*, 788 F.2d 918, 922 (3d Cir. 1986); *United States v. Fishbach & Moore, Inc.*, 750 F.2d 1183, 1195-96 (3d Cir. 1984), *cert. denied*, 470 U.S. 1029 (1985). Similarly, failure to use a requested instruction is not erroneous if the point was "substantially covered by other instructions." *See United States v. Smith*, 789 F.2d 196, 204 (3d Cir.), *cert. denied*, 479 U.S. 1031 (1986).

In this case, my charge informed the jury of the two alleged objects of the conspiracy.[7] I also charged the jury

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[7] I instructed the jury as follows with respect to the substantive offenses underlying the conspiracy count:

> [T]he indictment charges Mr. Gross and Mr. Searcy with conspiracy to violate federal law specifically that they—and now I'm going to quote from the indictment, A and B.
>
> A, that they "did knowingly, willfully and unlawfully, by use of means and instrumentalities of interstate commerce and the mails, directly and indirectly use and employ, manipulative and deceptive devices and contrivances, in connection with the purchase and sale of securities registered on a national securities exchange, in contravention of Rule 10b-5 with a citation of the rules and regulations promulgated by the Securities and Exchange Commission, and did employ devices, schemes and artifices to defraud by, one, making and causing to be made untrue statements of material facts and by, two, engaging in acts, practices and courses of business which would and did operate as a fraud and deceit upon the shareholders of SCT and the investing public, in violation of Title 15, United States Code, Sections 78J(B) and 78FF-(a) and Rule 10b-5." That's A. Now B.
>
> It's alleged that they "did knowingly, willfully and unlawfully make or cause to be made false and misleading statements in

on the four essential elements the government must prove beyond a reasonable doubt in a conspiracy case. *See* Transcript of February 13, 1990, afternoon session, at 111-121.

During the course of my charge, I instructed the jury that one of the elements of the conspiracy the government is required to prove beyond a reasonable doubt is that the defendant knowingly, willfully and voluntarily became a participant in or a member of the conspiracy with the intent to further its unlawful purpose. *See* Transcript of February 13, 1990, afternoon session, at 115. I further instructed the jury as follows:

> An act is done knowingly if done voluntarily and intentionally and not because of mistake or accident or other innocent reason. The purpose of adding the word "knowingly" is to insure that no one will be convicted for an act done because of mistake or accident or other innocent reason. An act is done willfully if done voluntarily and intentionally and with the specific intent to do something the law forbids. That is to say, with bad purpose either to disobey or disregard the law. An act is done intentionally if it is done knowingly and deliberately. An act is done intentionally if it is done knowingly and deliberately. In other words, a defendant acts intentionally if it's his conscious purpose to bring about the conduct that is proscribed—that is, forbidden—by the statute at issue.

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quarterly reports of SCT on form 10Q for the Second and Third Quarters of the fiscal year ended September 30, 1984, which quarterly reports were required to be filed with the Securities and Exchange Commission, in violation of Title 15, United States Code, Sections 78MA and 78FF(a), 17 Code of Federal Regulations, Section 240.13a-13 and Title 18, United States Code, Section 2.

Transcript of February 13, 1990, afternoon session, at 108-09. This excerpt is Gross's request no. 15.

> Now, with respect to an offense such as is charged in this case, specific intent must be proved beyond a reasonable doubt before there can be a conviction. . . .
>
> * * *
>
> Before you may find that a defendant has become a member of a conspiracy, the evidence in the case must show beyond a reasonable doubt that the conspiracy was knowingly formed and that the defendant willfully participated in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy.
>
> To act or participate willfully means to act or participate voluntarily and intentionally and with specific intent to do something the law forbids or with specific intent to fail to do something the law requires to be done. That is to say, to act or participate with a bad purpose either to disobey or disregard the law.
>
> So, if a defendant or any other person with understanding of the unlawful character of a plan knowingly encourages, advises or assists for the purpose of furthering the understanding or scheme, he thereby becomes a willful participant, a conspirator.

Transcript of February 13, 1990, afternoon session, at 115-17.

Gross argues that in addition to the foregoing, I should have charged the jury as follows concerning the conspiracy count:

> Since an essential element of the crime charged is intent to defraud, it follows that good faith on the part of a defendant is a complete defense to a charge of securities fraud. A defendant, however, has no burden to establish a defense of good faith. The burden is on the government to prove fraudulent intent and consequent lack of good faith beyond a reasonable doubt.

> Even false representations or statements or omissions of material facts do not amount to a fraud unless done with fraudulent intent. However misleading or deceptive a plan may be, it is not fraudulent if it was devised and carried out in good faith. An honest belief in the truth of the representations made by a defendant is a good defense, however inaccurate the statements may turn out to be.

Objections to Government's Proposed Jury Instructions and Proposed Jury Instructions of Defendant Frederick A. Gross, No. 26, at p. 26.[8] *See* Transcript of February 13, 1990, afternoon session, at 152-53. Gross contends that my refusal to give this charge deprived him of the right to have the jury consider his central defense.

I decline to accept Gross's argument. The majority of federal appellate courts which have considered this issue have concluded that a "good faith" charge is not required when the jury is properly instructed on the requisite level of intent the government must prove in order to secure a conviction. *See United States v. Niciva*, 887 F.2d 1110, 1125 (1st Cir. 1989), *cert. denied*, 110 S.Ct. 1300 (1900); *United States v. Hunt*, 794 F.2d 1095, 1097-98 (5th Cir. 1986); *United States v. Gray*, 751 F.2d 733, 736 (5th Cir. 1985); *United States v. Green*, 745 F.2d 1205, 1209 (9th Cir. 1984), *cert. denied*, 474 U.S. 925 (1985); *United States v. McGuire*, 744 F.2d 1197, 1201-02 (6th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985); *United States v. Gambler*, 662 F.2d 834, 837 (D.C. Cir. 1981).[9]

My instructions to the jury on the conspiracy count adequately covered both the two objects of the conspiracy

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[8] This instruction was adapted from Judge Sand's *Modern Federal Jury Instructions (Criminal)*, No. 57-25 at 57-96 (1988).

[9] To the extent that *United States v. Casperson*, 773 F.2d 216 (8th Cir. 1985) and *United States v. Hopkins*, 744 F.2d 716, 718 (10th Cir. 1984) conflict with this line of cases, I decline to follow them.

and repeatedly cautioned the jury that the government must prove that defendant's joinder in the conspiracy was undertaken knowingly and willfully and with the specific intent to encourage, advise or assist in the furtherance of the unlawful understanding or scheme. *See* discussion, *supra*, at 12-13. These instructions informed the jury that they could not convict the defendant without unanimously finding that he acted with specific intent to violate the law. Therefore, in order to convict Gross of conspiracy, the jury was required to find that Gross "knowingly and wilfully" conspired to commit the objects of the conspiracy. The instructions placed Gross's "good faith" defense directly before the jury.[10]

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[10] That the jury considered Gross's defense is confirmed by their responses to the Special Verdict Form, which Gross's counsel agreed to submit to the jury. The Special Verdict Form required the jury to determine specifically whether Gross knowingly and willfully conspired to commit each object of the conspiracy. The jury completed the form's questions as follows:

> As to Count I of the Superseding Indictment, does the jury unanimously find that from in or about January, 1984 to on or about January 25, 1985, the defendant Frederick A. Gross knowingly and willfully conspired to commit one or more of the following offenses against the United States:
>
> 1. By use of interstate commerce and the mails, did use and employ manipulative and deceptive devices and contrivances, in connection with the purchase and sale of securities registered on a national securities exchange.
>
> | YES | NO |
> |---|---|
> | X | |
>
> 2. Did employ devices, schemes and artifices to defraud:
>
> | YES | NO |
> |---|---|
> | X | |
>
> If your answer to question 2 is "YES," did the defendant:
>
> (a) Make and cause to be made untrue statements of material facts and omit to state material facts?
>
> | YES | NO |
> |---|---|
> | X | |

[Continued]

I also note that the jury's verdict on Count One can be sustained solely on the basis of its conclusion that Gross conspired to violate Section 32(a), 15 U.S.C. 78ff(a). The jury was properly instructed as to the elements of proof of this object of the conspiracy. *See United States v. Schwartz*, 464 F.2d 499, 508-510 (2d Cir.), *cert. denied*, 409 U.S. 1009 (1972). The special verdicts returned by the jury demonstrate that the jury unanimously agreed that Gross conspired to violate 15 U.S.C. § 78ff(a) by making false and misleading statements in SCT's quarterly reports on Form 10Q for the second and third quarters of fiscal year ended September 30, 1984. *See, supra*, note 7, question 3. Thus, the verdict on Count One can rest solely on the jury's determination that the defendant conspired to commit the offenses charged in Counts Two and Three. *See United States v. Ryan*, 828 F.2d 1010, 1015 (3d Cir. 1989); *United States v. Gallagher*, 576 F.2d 1038, 1046 (3d Cir. 1978), *cert. dismissed*, 444 U.S. 1040 (1980).

## IV. *Conclusion.*

For the foregoing reasons, Gross's motion for acquittal or, in the alternative for a new trial, will be denied.

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[10] [Continued]

(b) Engage in acts, practices and courses of business which would and did operate as a fraud and deceit upon the shareholders of SCT and the investing public?

| YES | NO |
|---|---|
| X | |

3. Knowingly, willfully and unlawfully make and cause to be made false and misleading statements in quarterly reports of SCT on Form 10-Q for the second and third quarters of fiscal year ended September 30, 1984, which reports were required to be filed with the Securities and Exchange Commission.

| YES | NO |
|---|---|
| X | |

/s/ _____

Date: 2/16/90 FOREPERSON

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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Criminal Action No. 89-00174-01

UNITED STATES OF AMERICA

v.

FREDERICK A. GROSS

ORDER

AND NOW, this 8th day of June, 1990, upon consideration of the motion of defendant Frederick A. Gross for judgment of acquittal or, in the alternative for a new trial, and of the supporting and opposing memoranda thereto, and after oral argument, for the reasons stated in the accompanying memorandum, it is hereby ORDERED that said motion is DENIED.

/s/ Thomas N. O'Neill, Jr.
THOMAS N. O'NEILL, JR. J.

## APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 91-1520

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UNITED STATES OF AMERICA,
*Appellee*

v.

FREDERICK A. GROSS,
*Appellant*

(D.C. Crim. No. 89-00174-01)

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SUR PETITION FOR PANEL REHEARING

[Received and Filed 5-19-92]

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Before: BECKER and ROTH, *Circuit Judges*, and McCUNE, *District Judge.**

The petition for rehearing filed by appellant having been submitted to the judges who participated in the decision of this court and no judge who concurred in the decision having asked for rehearing, the petition for panel rehearing is DENIED.

BY THE COURT:

/s/ Raymond R. Becker
Circuit Judge

DATED: May 19, 1992

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* Honorable Barron P. McCune, United States District Judge for the Western District of Pennsylvania, sitting by designation.